Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

June 2006

No notice of potential legal rights after denial of class certification. After the court denied class certification, it approved a letter be sent to the putative class members advising them they might have valid claims against defendant. The Court of Appeal reversed, holding that it is not the court's role to order notification of possible legal claims and that such a communication would draw the court's impartiality into question. *Experian Information Solutions, Inc. v. Superior Court (Sorensen)* (Cal. App. Fourth Dist., Div. 3; March 30, 2006) 138 Cal.App.4th 122, [2006 DJDAR 3824].

How not to write an appellate brief. Anyone inexperienced in appellate brief writing (and perhaps some who have written such briefs before) should read *In re S. C.* (Cal. App. Third Dist.; April 7, 2006) [2006 DJDAR 4157]. In the language of the court: "This is an appeal run amok. Not only does the appeal lack merit, the opening brief is a textbook example of what an appellate brief should not be…appellant's counsel has managed to violate rules of court; misrepresent the record; base arguments on matters not in the record on appeal; fail to support arguments with any meaningful analysis and citation to authority; raise an issue that is not cognizable in an appeal by her client; unjustly challenge the integrity of the opposing party; make a contemptuous attack on the trial judge; and present claims of error in other ways that are contrary to common sense notions of effective appellate advocacy…" It took a further 12 pages of the opinion to document each of these charges. Finally, the court ordered that a copy of the opinion be sent to the State Bar, presumably so that the Bar may consider disciplinary action against Julie Lynn Wolff, the author of the brief.

Caution regarding appeals from anti-SLAPP orders. An order granting or denying an anti-SLAPP motion to strike is appealable. *Code Civ. Proc.* §425.16 (i). Therefore, the time to appeal from such an order starts to run from notice of the order. Thus, if the motion is granted, the normal rule where plaintiff's time to appeal would start to run from the date of entry of notice of judgment does not apply.

No assumption of risk where statute violated. Starting with *Knight v. Jewett* (1992) 3 Cal.4th 296, [834 P.2d 696, 11 Cal.Rptr.2d 2], our courts have held that under the primary assumption of risk doctrine, participants in sports are not liable for their negligence unless their conduct increases the risks inherent in the sport. But violation of a statute increases such risks and therefore the doctrine does not apply. In *Huff v.*

Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: http://members.calbar.ca.gov/discuss to explore the new bulletin board feature—just another benefit of Litigation Section membership.

Remember to first fill out the Member Profile to get to the Discussion Board!

CLE Program Update

Corporations Committee Teleseminar

The Corporations Committee of the Business Law Section of the State Bar of California is pleased to present a 90 minute teleseminar

The Changing Landscape of Attorney-Client Privilege for Corporations

Thursday, July 6, 2006
12:30–2:00 pm

Recently, both the duty of confidentiality and the attorney-client privilege have suffered attack from the Department of Justice, audit procedures, the Securities and Exchange Commission and elsewhere. This teleseminar covers developments and responses to the Federal sentencing guidelines and DOJ directives, and their impact on corporate clients.

Speakers:

Steven K. Hazen, Partner, Davis Wright Tremaine LLP, Los Angeles.

Russell J. Wood, Corporate Counsel, Agilent Technologies, Inc., Palo Alto

Cost: $67.50
Listeners will receive 1.5 hours of MCLE credit, including 1.0 hours of Ethics credit. To register for the program, click here. If you experience any problems with that link, you can find the program listed at: http://www.legalspan.com/calbar/telephone.asp under the tab "Tele-Seminars and Webinars."

Wilkins (Cal. App. Fourth, Div. 1; April 14, 2006) [2006 DJDAR 4449], plaintiff was injured in an off-road accident when he collided with a 12-year old driving an all-terrain vehicle. *Veh. Code* §38503 prohibits the use of such a vehicle by a minor unless certain safety training and supervision requirements are met. These requirements were not satisfied and therefore summary judgment for defendant based on the primary assumption of risk doctrine was reversed.

But can you insist that your male staff members all grow beards? In a split *en banc* decision the 9th Circuit has ruled that casinos may require female employees to wear makeup. The majority opinion by Judge Mary Schroeder concluded that "sex-based differences in appearance standards alone, without any further showing of disparate effects" does not create a prima facie case of gender discrimination and that the makeup requirements "must be viewed in the context of the overall policy" that included (obviously different) grooming standards for male employees. Justice Alex Kozinski in a dissenting opinion noted that "[t]he requirement that women spend time and money applying full facial makeup has no corresponding requirement for men, making the "overall policy" more burdensome for the former than for the latter." *See, Jespersen v. Harrah's Operating Company, Inc.* (9th Circ.; April 14, 2006) [2006 DJDAR 4549].

Sexual banter may not be inappropriate depending on the work environment. A comedy writers' assistant on the production team for the *Friends* television show sued, contending that sexually coarse and vulgar language used during plot conferences constituted sexual harassment. The trial court granted summary judgment for defendants and the Court of Appeal reversed. The California Supreme Court reversed the Court of Appeal, holding that "based on the totality of the undisputed circumstances, particularly the fact the *Friends* production was a creative workplace focused on generating scripts for an adult-oriented comedy show featuring sexual themes," no reasonable trier of fact could conclude the language constituted harassment directed at plaintiff. The court noted that the law against sexual harassment "is not a 'civility code' and is not designed to rid the workplace of vulgarity." *Lyle v. Warner Brothers Television Productions* (Calif. Supr. Ct.; April 20, 2006) [2006 DJDAR 4691].

L.A. ordinance criminalizing sleeping on sidewalks held to be unconstitutional. The Ninth Circuit Court of Appeal held that a Los Angeles ordinance that criminalizes sitting, lying, or sleeping on public streets and sidewalks violates the Eighth Amendment's ban on cruel and unusual punishment. *Jones. v. City of Los Angeles* (9th Cir.; April 14, 2006) [2006 DJDAR 4617]. Judge Rymer, dissenting, noted that the majority reached its conclusion "by cobbling together the views of dissenting and concurring justices, creating a circuit conflict on standing, and overlooking both Supreme Court precedent and our own that restrict the substantive component of the Eighth Amendment to crimes not involving an act."

Abuse your former spouse, lose your spousal support. Under *Fam. Code* §4325, a spousal support order was terminated because

Litigation Section Events

A Week in Legal London
July 9-14, 2006

A Week in Legal London is an extraordinary opportunity to experience the inner workings of the English legal system, expand litigation skills and engage in thought provoking discussions with leading distinguished +members of the London legal community. Attend sessions at the Royal Courts of Justice, the Old Bailey, Magistrates and Crown Courts. Meet and dine with leading judges, barristers and solicitors. Visit the four Inns of Court and historic sites in London.

Oxford University Summer Program
Magdalen College, Oxford University

July 16-20, 2006

In conjunction with A Week in Legal London, the Litigation Section's Oxford University Summer Program is an "inside the walls" experience at Magdalen College, Oxford University. This program is a combination of both law and history, fascinating to all participants, attorneys and non-attorneys alike. You can choose to attend either the London or Oxford program or both. By attending both programs you will satisfy all you MCLE requirements including the mandatory subjects.

For a more complete description of each program see our web site, or call the Litigation Section at (415) 538-2546.

Click here: State Bar of California Week in the UK

the supported spouse was convicted of intra-spousal domestic violence. The court applied the statute, even though the spousal support provision in the settlement agreement provided it was non-modifiable. *IRMO Cauley* (Cal. App. Sixth Dist.; April 24, 2006) [2006 DJDAR 4916].

Review granted in class-action waiver case. In our March 2006 newsletter, we reported that *Gentry v. Sup.Ct. (Circuit City Stores, Inc.)* (Cal. App. Second Dist., Div. 5, January 19, 2006) [2006 DJDAR 737], held that where plaintiff was given 30 days to opt out of a contract waiving the right to bring a class action, the contract was not of adhesion and the class-action waiver should be enforced. The California Supreme Court has granted review in the case. (Cal. Supr. Ct.; April 26, 2006) [2006 DJDAR 5070] (Case No. S141502.)

The Litigation Section of the California State bar is evaluating whether and how the *California Code of Civil Procedure* and *California Rules of Court* should be amended to deal with discovery of electronic information. The Section needs your help and asks that you take a few moments to participate in a member survey that seeks your experience and opinions about what is working and what is not working in this area. Your participation is anonymous unless you choose to share your contact information. The survey will take approximately 10 minutes.

To participate, click here or paste this web address into your web-browser: http://www.surveyconsole.com/console/takesurvey?id=195323

Your participation is important and greatly appreciated.

Prosecutors are bound by their plea bargain. Defendant pleaded guilty to eight robberies in 1986 based, in part, on the prosecutor's representation that only one conviction would be on his record. When, in 2000, he was convicted of other felonies, the court sentenced him under the Three Strikes Law as having eight prior convictions. The Ninth Circuit Court of Appeal reversed holding that counting the 1986 conviction as eight strikes violated the plea agreement and also violated contract law. *Davis v. Woodford* (9th Circ.; April 27, 2006) [2006 DJDAR 5033].

One who assumes a duty may be liable for its breach. Defendant guard services contracted to provide a guard at a 7-Eleven store during specified hours. A cashier was attacked by a customer during these hours, the guard had failed to arrive. He sued the guard service. The trial court, concluding the service owed no duty to the cashier granted defendant's motion for summary judgment. The Court of Appeal reversed. Under the "negligent undertaking" doctrine defendant had assumed the duty to protect plaintiff. There is a question of fact whether the presence of the guard would have prevented plaintiff's injuries. *Mukthar v. LatinAmerican Security Service* (Cal. App. Second Dist., Div. 8; May 8, 2006) [2006 DJDAR 5513].

Partial fees awarded where defendant only prevails partially on anti-SLAPP motion. The anti-SLAPP statute (*Code Civ. Proc.* §425.16) mandates an award of attorney fees where defendant prevails on the special motion to strike. But what should the court do if defendant is successful in striking some but not all causes of action under the statute? In our March 2006 newsletter, we reported on *Endres v. Moran* (Cal. App. Second Dist., Div. 5, January 19, 2006) 135 Cal.App.4th 952, [37 Cal.Rptr.3d 786, 2006 DJDAR 739], where defendant was only successful in having a single cause of action, out of many, stricken. There, the Court of Appeal agreed with the trial court that an award of attorney fees was not required because defendant could not "in any realistic sense" be said to have prevailed. In *Mann v. Quality Old Time Service, Inc.* (Cal. App. Fourth Dist., Div. 1; May 9, 2006) [2006 DJDAR 5565] the court resolved the issue by awarding defendant fifty percent (50%) of their claimed fees where it found that, although the motion was only partially successful, "the practical impact of the motion was far more significant than the mere dismissal [of a cause of action]."

Model Code of Civility and Professionalism

As Litigation Section members you can review the Model Code of Civility and Professionalism. We enciurage you to do so and post your comments on the Discussion Board at http://members.calbar.ca.gov/mb/ShowForum.aspx?ForumID=13